Service Corporation International d/b/a Oak Hill Funeral Home and Memorial Park *and* Laborers' International Union of North America, AFL–CIO, Local Union 270, Petitioner and Cemetery Workers and Greens Attendants Union, Local 265, Service Employees International Union,[1] Intervenor. Case 32–RC–5235

August 27, 2005

DECISION AND CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held July 16, 2004, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows 23 for the Petitioner, 0 for the Intervenor, and 20 against the participating labor organizations. There was one challenged ballot, which was insufficient to affect the results of the election.

The Board has reviewed the record in light of the exceptions and briefs,[2] has adopted the hearing officer's findings[3] and recommendations,[4] and finds that a certification of representative should be issued.

In Objection 2, the Employer alleges that a marked sample ballot flyer sent by the Petitioner to the Employer's maintenance employees had the tendency to mislead employees into believing that the Board favored the Petitioner in the election. The hearing officer recommended that the Employer's Objection 2 be overruled based on his conclusion that the employees would have understood that the marked sample ballot emanated from the Petitioner and was merely propaganda. We adopt the hearing officer's recommendation, but not his entire rationale. As discussed below, we find that employees would not have been misled by the sample ballot flyer at issue based on the physical appearance of the document itself, and the totality of the circumstances surrounding its source and distribution.

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[1] We have amended the caption to reflect the disaffiliation of the Service Employees Intervention Union from the AFL–CIO, effective July 25, 2005.

[2] In its brief in support of its exceptions, the Employer asserts that the record of this proceeding discloses that counsel for one party referred to counsel for the other party as a "fu__ing slime ball." The record also reflects that, when questioned by the hearing officer, the counsel to whom the record attributed the remark denied making it.

Sec. 102.177 of the Board's Rules and Regulations addresses, inter alia, "Misconduct by attorneys and party representatives before the Agency." An obligation under that section is as follows:

> "Any attorney or other representative appearing or practicing before the Agency shall conform to the standards of . . . professional conduct required of practitioners before the courts. . . ." [Sec. 102.177(a).]

The section then sets forth a disciplinary process which may result in a formal reprimand, suspension, or disbarment from practice before the Board.

Conformance to the standards of professional conduct is required of attorneys or other representatives appearing or practicing before the Agency in the same manner as is required of counsel appearing before the courts. Under the American Bar Association Model Rules of Professional Conduct, adopted by many states, "[a] lawyer shall not . . . engage in conduct intended to disrupt a tribunal." Rule 3.5 (Impartiality and Decorum of the Tribunal). The Model Rules' annotation explains that "[r]efraining from abusive or obstreperous conduct is a corollary of the advocate's right to speak on behalf of litigants."

Administrative law judges and hearing officers should be mindful of the standards of professional conduct mandated under Sec. 102.177 in conducting proceedings before the Agency. Where counsel engages in conduct that allegedly violates these standards of professional conduct, the administrative law judge or a hearing officer should refer the conduct for investigation, in accordance with Sec. 102.177(e), to determine if misconduct occurred and if discipline is warranted. Similarly, any other person, including the Regional Director or the opposing counsel, may refer conduct for investigation in accordance with that section. In addition to the procedures set forth in Sec. 102.177(e) for handling allegations of misconduct, the administrative law judge or hearing officer has "the authority . . . to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing." Sec. 102.177(b).

[3] The Employer has excepted to some of the hearing officer's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

Pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Employer was permitted to call to the Board's attention its recent decisions in *Harborside Healthcare, Inc.*, 343 NLRB No. 100 (2004), and *Sofitel San Francisco Bay*, 343 NLRB No. 82 (2004). We deny the Employer's request to file additional briefs concerning these cases.

[4] In Objection 1, the Employer alleges, inter alia, that Superintendent of Construction Pat Kintzley engaged in objectionable prounion supervisory conduct. The hearing officer recommended overruling this portion of Objection 1. We adopt the hearing officer's recommendation, but we rely solely on the hearing officer's credibility determinations, which establish that the supervisory conduct alleged to be objectionable did not occur. We otherwise disavow the hearing officer's legal analysis in light of our recent decision in *Harborside Healthcare*, supra (Members Liebman and Walsh dissenting), which issued after the hearing officer's report and which clarified the circumstances under which "the prounion activity of a supervisor will be held to constitute objectionable conduct, such that a new election is warranted." Id., slip op. at 1. Member Liebman, who dissented from the majority's decision in *Harborside*, concurs here in the decision to overrule the Employer's supervisory taint objection.

In the absence of exceptions, we adopt, pro forma, the hearing officer's recommendation that the remaining portions of Objection 1 be overruled.

I. FACTS

On March 15, 2004,[5] the Petitioner, Laborers' International Union of North America, AFL–CIO, Local 270 (the Union or Local 270), filed a petition for election. For the next 4 months, the Union sent various flyers containing prounion propaganda, in both Spanish and English, to the homes of the Employer's maintenance employees. After the Union received the *Excelsior* list[6] on July 2, it sent two successive flyers, each containing a marked sample ballot, to all eligible voters.

The first of these flyers, which is the primary subject of the Employer's exceptions, was sent on or about July 5. This flyer is two-sided, one in Spanish, the other in English, and consists of an off-center photocopy of the center panel of the Board's official notice of election. Located at the top of the flyer is the unit description; at about the middle of the flyer, the date, time, and place of the election are listed; and at the bottom half of the flyer is the sample ballot.[7] A handwritten "X" is marked in the box for Local 270, extending beyond the borders of the box. While most witnesses testified to receiving the flyer in a union envelope bearing a union logo, together with a union business card, the flyer on its face does not identify its source.

Turning to the Spanish language version of the flyer (the native language of most of the Employer's maintenance employees), at the top and bottom of the page there appears preprinted language that is included on every official Spanish language version of the Board's official notice of election. The Spanish language version of the flyer, however, does not reproduce the preprinted language in full; rather, the sentences are truncated and words that appear in the official notice are missing. For example, at the top margin, only the words "JUNTA NATIONAL DE" ("NATIONAL BOARD OF") are visible. At the bottom, where the Board's official notice disclaims Board involvement in any defacement of the sample ballot and specifies the Board's neutrality in the election process,[8] only the following words appear in full: "Y NO DEBE SER MUTILADO POR NINGUNA PERSONA . . . A LA JUNTA NATIONAL DE RELACIONES DE TRABAJO, Y NO . . . DEL GOBIERNO DE LOS ESTADOS UNIDOS Y NO ENDOSA A NINGUNA" ("AND MUST NOT BE DEFACED BY ANYONE . . . THE NATIONAL LABOR RELATIONS BOARD, AND NOT . . . THE GOVERNMENT OF THE UNITED STATES DOES NOT ENDORSE ANY").[9]

The week of the election, the Union sent a second marked sample ballot flyer. The second flyer is also two-sided, one in Spanish, the other in English, and also includes a photocopy of the sample ballot section of a Board election notice. A handwritten "X" is marked in the box for Local 270, extending beyond the borders of the box. The second flyer includes various exhortations to vote for the Union, including, "Votando si por la union local 270=Ganar un mejor pago, Seguridad en tu trabajo, Seguro Medico y un Plan de Pension que garantize tu futuro y el de tu familia" ("Voting yes for the union local 270=Earning better pay, Security in your job, Health Insurance and a Pension Plan that guarantees your future and that of your family"). The Employer acknowledges that the second flyer was clearly identified as Union propaganda.

In addition to these two flyers, the testimony of both Employer and union witnesses establishes that the Union sent somewhere in the range of 20–30 other flyers to the employees in the months leading up to the election on July 16.

The Employer also posted the Board's official notice of election in prominent places in and around its facility (i.e., the lunchroom, the main administrative building, and the maintenance yard). Nothing on these notices was defaced, including the full language of the Board's disclaimer, because the Employer had the documents laminated. Further, the Employer held meetings with employees (in the same locations in which it posted the official Board notices) in order to, among other things, answer any questions employees had about the materials they were receiving from the Union. At these meetings, the Employer reviewed sample ballots with employees.

[5] All dates are 2004 unless otherwise noted.

[6] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[7] A copy of the Spanish language version of the flyer is attached as an appendix.

[8] The Board's official disclaimer reads as follows: "WARNING: THIS IS THE ONLY OFFICIAL NOTICE OF THIS ELECTION AND MUST NOT BE DEFACED BY ANYONE. ANY MARKINGS THAT YOU MAY SEE ON ANY SAMPLE BALLOT OR ANYWHERE ON THIS NOTICE HAVE BEEN MADE BY SOMEONE OTHER THAN THE NATIONAL LABOR RELATIONS BOARD, AND HAVE NOT BEEN PUT THERE BY THE NATIONAL LABOR RELATIONS BOARD. THE NATIONAL LABOR RELATIONS BOARD IS AN AGENCY OF THE UNITED STATES GOVERNMENT, AND DOES NOT ENDORSE ANY CHOICE IN THE ELECTION."

[9] The Employer argues that the Union "redacted" the flyer in a manner that "inverted" the meaning of the Board's disclaimer to suggest that the Board endorsed the Union in the election. We find, however, as did the hearing officer, that the Employer's translation of the words that appear on the bottom of the flyer is both inaccurate and incomplete. Indeed, contrary to the Employer's representations, the words "MUST NOT BE DEFACED BY ANYONE" AND "THE GOVERNMENT OF THE UNITED STATES DOES NOT ENDORSE ANY" are consistent with, and not an "inversion" of, the concept of Board neutrality.

The hearing officer recommended overruling the Employer's objection. The hearing officer found that while the source of the first marked sample ballot was not clearly identifiable on its face, it was evident from the circumstances of the document's distribution that employees would know that it emanated from the Union and was merely propaganda. In its exceptions, the Employer argues, inter alia, that the extrinsic evidence in this case does not support the hearing officer's conclusion that employees would not have been misled by the marked sample ballot at issue. The Employer asserts that under the Board's recent decision in *Sofitel San Francisco Bay*, 343 NLRB No. 82 (2004), the election should be set aside. We disagree, for the reasons discussed below.[10]

II. ANALYSIS

The framework for analysis of altered sample ballot cases, a two-pronged test, is set forth in *SDC Investment, Inc.*, 274 NLRB 556 (1985). First, if the source of an altered sample ballot is clearly identifiable on the face of the ballot, then the Board will find the distribution of the document not objectionable because "employees would know that the document emanated from a party, not the Board, and thus would not be led to believe that the party has been endorsed by the Board." Id. at 557. If, however, as here, the source of the altered sample ballot at issue is not clearly identifiable on its face, under the second prong of *SDC Investment*, "it becomes necessary to examine the nature and contents of the material in order to determine whether the document has the tendency to mislead employees into believing that the Board favors one party's cause." Id. In making this determination, the physical appearance of a document may support the conclusion that it is not misleading where the document would appear to a reasonable employee to be an obvious photocopy of an official document marked up by a party as part of its campaign propaganda. See, e.g., *Worths Stores Corp.*, 281 NLRB 1191, 1193 (1986) (document found not misleading where "it was clear that the sample ballot had been cut from another form," that the printed material was not centered on the page, and that markings from a photocopy machine would have led employees to conclude that the documents were not "official" Board material).

In *3-Day Blinds, Inc.*, 299 NLRB 110, 111 (1990), and the cases cited therein, the Board expanded on the *SDC* analysis. In that case, the Board made clear that in examining the nature and contents of the document at issue, an inherently fact-based exercise, it will also look to the extrinsic evidence of the document's preparation, as well as the circumstances surrounding the document's distribution. Id. at fn. 7 (citing cases). While evidence showing that a party distributed the document, without more, will not establish that the party prepared the document, it is relevant extrinsic evidence to be viewed in the totality of the circumstances of the document's distribution. Id. at 112. Likewise, evidence of the proper posting of the Board's official notice of election with its language that disavows the Board's role in any defacement and specifies the Board's neutrality in the election process will not, without more, be dispositive in cases involving a separate distribution of marked sample ballots.[11] *Sofitel*, supra, slip op. at 3. However, as the court stated in *VIP Health Care Services v. NLRB*, 82 F.3d 1122, 1130 (D.C. Cir. 1996), it is reasonable to rely on this evidence to bolster the determination that the sample ballot satisfies the *SDC Investment* analysis.

As in the cases cited above, the two-pronged *SDC Investment* standard should be applied to the marked sample ballot at issue in this case. We agree with the hearing officer that under the first prong of the inquiry, nothing on the face of the sample ballot clearly identified the Union as the organization responsible for preparing the document. We also agree, however, that under the second prong of the inquiry, a reasonable employee would know, based on both the physical appearance of the document and the extrinsic evidence of its source and distribution, that this sample ballot emanated from the Union and was merely propaganda.

With respect to the physical appearance of the document itself, as in *Worths Stores*, supra, it is apparent that the flyer at issue here is an off-center photocopy of a portion of another document. In addition, the partial reproduction of the Board's disclaimer at the bottom of the page, coupled with the partial phrases and words that appear at the top and the bottom of the document, would tend to lead an employee to conclude that the flyer is not "official" Board material. Moreover, while certainly not dispositive, the partial reproduction of the Board's disclaimer that was included in the flyer, "Y NO DEBE SER MUTILADO POR NINGUNA PERSONA . . . A LA JUNTA NATIONAL DE RELACIONES DE TRABAJO, Y NO . . . DEL GOBIERNO DE LOS ESTADOS UNIDOS Y NO ENDOSA A NINGUNA" ("AND MUST NOT BE DEFACED BY ANYONE . . . THE NATIONAL LABOR RELATIONS BOARD, AND NOT . . . THE GOVERNMENT OF THE

[10] Member Liebman did not participate in *Sofitel*. However, she agrees with Member Schaumber that, for the reasons set forth infra, *Sofitel* is distinguishable from this case.

[11] By contrast, in cases involving the defacement of the Board's official notice of election, the disclaimer language precludes a reasonable impression that the Board endorses any choice in the election. *Brookville Healthcare Center*, 312 NLRB 594 (1993).

UNITED STATES DOES NOT ENDORSE ANY") would tend to reinforce the impression of the Board's neutrality in elections.

Furthermore, extrinsic evidence of the document's source and distribution beyond the four corners of the document itself supports the conclusion that a reasonable employee would not have been misled into believing that the Board endorsed the Union in the election. For example, it is undisputed that the marked sample ballot flyer at issue was one of a great many mailings that employees received from the Union during the critical period. Indeed, the evidence showed that employees received this marked ballot in the context of having received numerous mailings of union propaganda in the months and weeks leading up to the election, including a second marked sample ballot flyer that the Employer concedes was properly identified union campaign literature. In addition, the preponderance of the evidence shows not only that the flyer at issue was mailed in a union envelope, but also that the mailing included a union business card.[12] Thus, while the union envelope standing alone is by no means dispositive of the source of the sample ballot, the union envelope, taken together with the union business card, and when viewed in context of the numerous union mailings sent to employees during the critical period, provides relevant extrinsic evidence of the document's distribution. *3-Day Blinds*, supra.

The Employer relies on *Sofitel San Francisco Bay*, 343 NLRB No. 82 (2004), to argue that the marked sample ballot flyer sent to employees would tend to mislead employees and thus the election should be set aside. In *Sofitel*, the Board sustained the employer's objection and set aside the election based on its finding that the marked sample ballot had a tendency to mislead employees into believing the Board endorsed the Union in the election. We find, contrary to the Employer's contentions, that *Sofitel* is factually distinguishable. First and foremost, in *Sofitel*, there were no words or markings on the document at issue that indicated that it was a photocopy of a portion of another document. Here, in contrast, the flyer at issue is off-center, it contains stray marks that are characteristic of photocopied documents, and the top and bottom of the flyer contain incomplete, truncated portions of words. Therefore, the flyer's appearance would lead employees to believe that it is not official Board material. Rather, employees would recognize the flyer as a photocopy of the middle page of the Board's election notice—the same official notice that was laminated and posted prominently in locations where the Employer held meetings to review sample ballots with employees. Similar to the photocopied document in *Worth Stores*, supra, 281 NLRB at 1193, the flyer here is not misleading, as it is "clear that the sample ballot had been cut from another form."

Second, the document in *Sofitel* contained no part whatsoever of the Board's disclaimer language and there was no evidence that employees had ever seen, much less discussed with the employer, any sample ballots that contained the Board's disclaimer language. Here, conversely, the flyer at issue contained a partial reproduction of the disclaimer, and the notice with full disclaimer language was prominently displayed in locations around the facility where the Employer also held meetings with Employees to discuss, inter alia, the sample ballots. *See Hospital General Menonita v. NLRB*, 393 F.3d 263, 269 (1st Cir. 2004) (Board's conclusion that employees would not have been misled by marked sample ballot in favor of union "strengthened" by employees' exposure to Board's disclaimer language) (citing *VIP Health Care Services v. NLRB*, 82 F.3d 1122, 1128–1129 (1996), and *Comcast Cablevision, Inc.*, 325 NLRB 833, 833 (1998)). Third, in *Sofitel*, extrinsic evidence of the document's source and distribution was limited to the union envelope it came in. Indeed, the evidence showed that the solitary piece of alleged union propaganda distributed to employees before the election was the marked sample ballot at issue, and the union actually *disclaimed* responsibility for sending even that document. In this case, however, not only was the flyer at issue sent in a union envelope with a union business card, but the Union also sent 20–30 additional flyers in the same manner, including a sample ballot containing a concededly partisan slogan and message. Thus, employees would likely perceive the photocopied sample ballot at issue as the same type of campaign propaganda.

To be clear, none of the extrinsic evidence in the present case, standing alone, is necessarily dispositive of the issue of whether the marked sample ballot flyer would have had the tendency to mislead employees. Nonetheless, the totality of circumstances—the physical appearance of the document, coupled with the extrinsic evidence of the document's source and distribution—certainly supports the hearing officer's conclusion that employees would not have reasonably assumed that the

[12] Six employee witnesses (two by stipulation) testified that they received the marked sample ballot inside a union envelope bearing the Union's return address and logo, and that a business card from the union organizer was also enclosed in the envelope. One employee called by the Employer, George Wanda, testified that he received the marked sample ballot that identified the Union as the sender, but was unsure if a business card was enclosed. Another employee called by the Employer, Jose Ruiz, testified that he received the marked sample ballot in an envelope that did not identify the Union as the sender; however, Ruiz acknowledged that this mailing came in the context of several other mailings by the Union.

marked sample ballot flyer emanated from the Board.[13] We certainly agree with our dissenting colleague that the Board's neutrality is essential to the integrity of the election process. However, we find that the totality of the circumstances in this case establishes that the Board's neutrality has not been reasonably called into question. Based on our careful review of all the facts, we adhere to another well-established principle that also reflects on the integrity of the election process: "Representation elections are not lightly set aside." See, e.g., *Delta Brands, Inc.*, 344 NLRB No. 10, slip op. at 2 (2005).

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Laborers' International Union of North America, AFL–CIO, Local Union 270, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and part-time cemetery grounds and maintenance employees, including all equipment operators, construction, landscape and gardening, shop, and vehicle repair employees, leadpersons, foremen and janitors, employed by the Employer at its San Jose, California facility, excluding all managerial and administrative employees, salespersons, office clerical employees, bereavement employees, all other employees, guards and supervisors as defined in the Act.

Dated, Washington, D.C. August 27, 2005

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues, I conclude that the nature and contents of the material (the marked ballot) had the tendency to mislead the employees into believing that the Board favored a vote for the Union. I would therefore sustain the Employer's objection and order a second election.

Approximately 3 weeks before the election, the Union mailed to all employees a copy of the center panel of the Board's notice of election, which contained a sample ballot and part of the Board's standard disclaimer. The document is attached hereto.[1] The document and a union business card were mailed to all voting employees in an envelope bearing the Union's logo and return address.

As can be seen from the attachment, the document contains an exact photocopy of a part of a sample Board ballot, with the exception that the "X" is marked in favor of the Laborers' Union. Given the fact that the ballot is an exact photocopy of an original, there is a reasonable concern that an employee would believe that the "X" was also on the original. In these circumstances, and in order to preserve the perception and reality of Board neutrality, I would order a second election.

As noted by my colleagues, in assessing the propensity of a marked sample ballot to mislead employees into believing that the Board supports one choice over another, the Board first looks to whether the source of the altered sample ballot is clearly identifiable on the face of the ballot. If nothing appears on the face of the ballot identifying the party who prepared it, the Board then looks to whether the ballot "has the tendency to mislead employees into believing that the Board favors one party's cause." *SDC Investment, Inc.*, 274 NLRB 556 (1985).

My colleagues concede that the sample ballot at issue fails to identify the Union, or indeed any party, as its source. Therefore, we must determine from the surrounding circumstances whether the employees reasonably would be misled into believing that the Board favors one party's cause. Applying *Sofitel San Francisco*, 343 NLRB No. 82 (2004), I find that the ballot would tend to mislead employees to believe that the Board was in favor of the Union.

Sofitel, 343 NLRB No. 82, involved a similar situation. The Board held that the marked sample ballot there had a tendency to mislead employees to believe that the Board favored *one* of the unions. My colleagues' effort to distinguish *Sofitel* is unsuccessful. They say that, in *Sofitel*, there were no words or markings on the ballot that would indicate that it was "necessarily" a photocopy of a Board ballot. However, that is not the issue. The issue is whether an employee would reasonably believe (not *necessarily* believe) that the ballot is a photocopy of a Board ballot. In the instant case, it is precisely the absence of extraneous markings (except for the offensive "X") which suggests that this ballot is a photocopy of a Board ballot. Anyone familiar with Board ballots can look at the attachment and see that the ballot is such a photocopy.

[13] In an appropriate case, Member Schaumber would consider the type of bright-line rule advocated by former Chairman Hurtgen in *Dakota Premium Foods*, 335 NLRB 228, 228–229 (2001) (Chairman Hurtgen, dissenting), which would require a clear disclaimer on the face of any altered sample ballot. *Sofitel*, supra, slip op. at 4 fn. 4.

[1] As discussed below, I find that the marked ballot is objectionable. The term "document," as used herein, refers to the entire attached document, of which the marked ballot is a part.

Similarly, my colleagues say that, in *Sofitel*, there was no partial disclaimer at the bottom of the document. But, it is precisely that partial disclaimer here which shows that the document is a partial photocopy of an official Board document.

My colleagues say that the document contains stray marks that are characteristic of a photocopied document. (By this, they apparently mean the vertical dots on the left side of the document.) I agree. Thus, an employee would reasonably conclude that the marks were not on the original. However, the same cannot be said about the "X" in the box favoring the Laborers. It would be reasonable for an employee to conclude that this photocopied "X" was in the original.

I recognize that the posted notice does not contain the "X" and it contains a full disclaimer. However, although part of the Board's standard disclaimer language appears on the sample ballot, that portion does not clearly communicate to employees that the Board does not support one party over another.

The cases relied upon by my colleagues are distinguishable. In each of them, the document itself contained language that made it clear that the document was union propaganda. Thus, for example, in *Worths*, 281 NLRB 1191, 1193, the document itself contained congratulatory headings and individualized salutations.

Concededly, the document was mailed in a union envelope, and the envelope contained a union business card. However, as my colleagues note, evidence showing that a party *distributed* a document does not itself establish that the party *prepared* the document. My colleagues also correctly observe that the Board's official notice (disavowing any defacements and proclaiming the Board's neutrality) is not dispositive as to objections that are based upon the separate distribution of a marked sample ballot. In addition, the official notice was posted approximately 2 weeks after the unidentified sample ballot was mailed to employees. Therefore, contrary to my colleagues, I do not believe that the Employer's subsequent posting of the official notice made the ballot acceptable under *SDC Investments*.

It is axiomatic that the election process is at the heart of the Act, and that the Board's neutrality (actual and perceived) is essential to the integrity of that process. I would not tolerate conduct which undermines those sacrosanct values. Accordingly, I would set this election aside.[2]

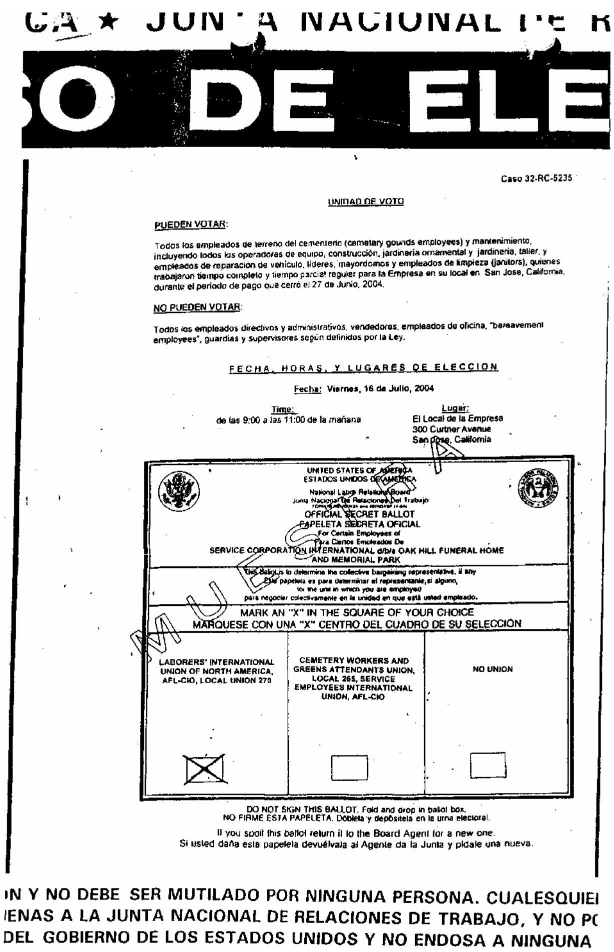
[2] I recognize that the Union subsequently sent a second flyer which contained prounion propaganda as well as other mailings containing prounion materials. However, these mailings do not cure the vice of the first flyer. Indeed, a reasonable employee would conclude that the first flyer was a photocopy of a Board document and the second flyer was a photocopy of a union document.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX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Caso 32-RC-5235

UNIDAD DE VOTO

PUEDEN VOTAR:

Todos los empleados de terreno del cementerio (cemetary gounds employees) y mantenimiento, incluyendo todos los operadores de equipo, construcción, jardinería ornamental y jardinería, taller, y empleados de reparación de vehículo, líderes, mayordomos y empleados de limpieza (janitors), quienes trabajaron tiempo completo y tiempo parcial regular para la Empresa en su local en San Jose, California, durante el periodo de pago que cerró el 27 de Junio, 2004.

NO PUEDEN VOTAR:

Todos los empleados directivos y administrativos, vendedores, empleados de oficina, "bereavement employees", guardias y supervisores según definidos por la Ley.

FECHA, HORAS, Y LUGARES DE ELECCION

Fecha: Viernes, 16 de Julio, 2004

Time: de las 9:00 a las 11:00 de la mañana

Lugar: El Local de la Empresa, 300 Curtner Avenue, San Jose, California

UNITED STATES OF AMERICA
ESTADOS UNIDOS DE AMERICA
National Labor Relations Board
Junta Nacional de Relaciones del Trabajo
OFFICIAL SECRET BALLOT
PAPELETA SECRETA OFICIAL
For Certain Employees of
Para Ciertos Empleados De
SERVICE CORPORATION INTERNATIONAL d/b/a OAK HILL FUNERAL HOME AND MEMORIAL PARK

This Ballot is to determine the collective bargaining representative, if any
Esta papeleta es para determinar el representante, si alguno,
for the unit in which you are employed
para negociar colectivamente en la unidad en que está usted empleado.

MARK AN "X" IN THE SQUARE OF YOUR CHOICE
MARQUESE CON UNA "X" CENTRO DEL CUADRO DE SU SELECCION

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL UNION 270	CEMETERY WORKERS AND GREENS ATTENDANTS UNION, LOCAL 265, SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO	NO UNION
☒	☐	☐

DO NOT SIGN THIS BALLOT. Fold and drop in ballot box.
NO FIRME ESTA PAPELETA. Dóblela y deposítela en la urna electoral.

If you spoil this ballot return it to the Board Agent for a new one.
Si usted daña esta papeleta devuélvala al Agente de la Junta y pídale una nueva.

MUESTRA

N Y NO DEBE SER MUTILADO POR NINGUNA PERSONA. CUALESQUIE
ENAS A LA JUNTA NACIONAL DE RELACIONES DE TRABAJO, Y NO P
DEL GOBIERNO DE LOS ESTADOS UNIDOS Y NO ENDOSA A NINGUNA